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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

GEORGE B. CHRISTIE, JESSE LOWE, AND James O. Heyworth, surviving partners of the firm of Christie, Lowe & Heyworth, appellants,
v.
THE UNITED STATES.
No. 204.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment wherein the court found in favor of the appellants on two claims and against them on all others.

The cause arose over the building of Locks and Dams Nos. 4, 5, and 6 on the Warrior River, Ala., for the construction of which appellants entered into a contract with the Government on March 10, 1900. By the terms of the specifications (par. 33, Rec., p. 24) the bidders were "expected to ex-

amine the drawings and * * * invited to make the estimate of quantities for themselves," and were authorized (spec. 3, Rec., p. 22) "to visit the place and make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies." Paragraph 33 (Rec., p. 24) also stated that the quantities given were only approximate, and that it must be understood that no claim should "be made against the United States on account of any excess or deficiency, absolute or relative, in the same." It was provided that "In all cases of dispute, the decision of the United States Engineer officer in charge will be accepted as final" (par. 78, Rec., p. 36).

The petition prayed judgment against the United States in the sum of $207,304.50. Judgment was rendered in favor of appellants in the sum of $9,491.57 for "delays in permitting the commencement of work," and for the cost to the contractors for the right of way for roads and bridges necessarily built by the contractors. (Findings II and III, Rec., pp. 50, 51.)

All of the other items of the petition were disallowed, from which portion of the judgment this appeal is taken.

Appellants assign the following errors:

I. Refusal to allow damages alleged to have been caused by "erroneous and deceptive borings."

II. Refusal to allow damages alleged to have been caused by the designation of "erroneous angles of repose."

III. Refusal to allow damages by reason of the alleged failure and refusal of the United States authorities to pay for certain cofferdams constructed by appellants on the order of the United States Engineer officer in charge.

The Government answers the assignments of error in their order as follows:

I. Appellants had presumptive and actual knowledge of the conditions of the bed of the river. The specifications contained only what the Government actually knew, indicated by the manner and purpose of making the borings. Appellants were not deceived; nor did they rely upon the Government's representations. The specifications contained no warranty.

II. The Engineer officer of the Government, being empowered, selected angles of repose in general use, thus excluding charge of bad faith. In the absence of protest by appellants and having been paid the contract price for all excavation removed, damages can not be collected.

III. The Government was not responsible for the cost of cofferdams, since it was provided that the contractors should build them at their own expense.

ARGUMENT.

I.

"ERRONEOUS AND DECEPTIVE BORINGS."

Appellants had presumptive and actual knowledge of the conditions of the bed of the river. The specifications contained only what the Government actually knew, indicated by the manner and purpose of making the borings. Appellants were not deceived; nor did they rely upon the Government's representations. The specifications contained no warranty.

(*a*) *Appellants had actual and presumptive knowledge of the conditions, which was sufficient notice without indicating anything further on the drawings, and excluded charges of erroneous and deceptive representations of borings.*

The specifications provide (par. 48, Rec., p. 28) as follows:

> The material to be excavated, *as far as known*, is shown by borings, drawings of which may be seen at this office, but bidders must inform and satisfy themselves as to the nature of the material. [Italics ours.]

Appellants allege (App. brief, p. 7) that the maps representing the borings accompanying the specifications were erroneous and deceptive, in that data was omitted from the drawings which would have shown that "a number of buried logs were discovered in the course of the borings," and because of this appellants were put to greater

expense in pile driving and excavating, which could not be anticipated from the drawings. They also claim damages (App. brief, p. 3) because the material encountered was " harder than was shown by the boring sheets."

Appellants do not claim that they were without knowledge of logs in the bed of the stream. In fact, they avoid this in their brief, which they must do, as Finding IV (Rec., 53) says " they admitted they had reason to, and did expect to, encounter some logs." Nor is it claimed that they relied upon the so-called warranty in the contract. On page 25 of appellants' brief appears as a heading, " Contractors rightly relied upon representations," but there is no assertion under this head that they did so rely, and any such assertion would have come in conflict with Findings I (Rec., 47) and IV (Rec., 53), which show that they made investigations. Appellants also failed to prove how much of the cost of driving the piles was due to the presence of the alleged " buried logs encountered in making the original borings, but not shown on the permanent records." (Rec., p. 57.)

The Government maintains that the knowledge of the character of the Warrior River at the points where the dams and locks were constructed, and both above and below these points with respect to embedded logs, stumps, and flood conditions, was so open and notorious that appellants, being re-

sponsible and intelligent persons, must be presumed to have had notice which eliminated the necessity of representing on the drawings logs encountered during the borings, if there had been any.

Finding IV (Rec., 53) shows that—

> The Warrior River is an alluvial stream, the banks of which below Tuscaloosa are largely covered with heavy timber and undergrowth. Above and below the sites selected for these locks and between the cities of Tuscaloosa and Demopolis the river is unusually tortuous and flows in a series of sharp bends. Its fluctuations between low water in summer and high water in winter and early spring range from less than 1 foot to more than 70 feet. In its flood stages the river overflows its banks and spreads out over the adjacent country from 2 to 5 miles. At high water large quantities of drift are carried by the stream, and in some cases large trees.
>
> For upward of 20 years prior to December 20, 1899, the United States had operated snag boats between Tuscaloosa and Demopolis on this river for the removal of stumps and sunken logs from the channel, and trees and other material known as "slip ins" which had caved in from the banks, full descriptions of which, with tables of numbers and statements of cost, were published annually in the reports of the Chief of Engineers.

These reports from the records of the War Department are as follows:

Report for 1881, Appendix K, pages 1204 and 1205.

Report for 1895, page 237, Appendix P 3, pages 1683 and 1692.

Report for 1896, pages 208–209, Appendix P 3, pages 1435 to 1437.

Report for 1897, pages 265–266, Appendix Q 4, pages 1679 to 1685.

Reports for 1898, pages 261–262, Appendix S 4, pages 1434 to 1436.

Report for 1899, pages 305–306, Appendix S 4, page 1708.

The report of Col. Rossell, published in that of the Chief of Engineers for 1897, two years before the advertisement for the construction of these locks was issued (Report, War Department, Engineers, vol. 2, pt. 2, 1897, p. 1680), in reference to such operations in the vicinity of the work on the Warrior River below Tuscaloosa shows work performed up to June 30, 1897, as follows:

	Number.
Snags and stumps removed	22,045
Sunken logs removed	500
Logs on banks cut up	1,339
Trees trimmed, deadened, felled, and cut up	18,168
"Slip ins" removed	908

Moreover (Rec., 53), "many partially submerged and embedded logs and stumps *were in plain sight on the banks and the bars of this river where the locks were located,* and the fact was

well known that logs were there." [Italics ours.] The following paragraphs of the specifications also indicate logs (Rec. pp. 27 and 28):

> 47. Grubbing and clearing.—Grubbing and clearing will cover the removal from the site of all trees, bushes, stumps, logs, roots, *as well as logs, stumps, and roots under water, or embedded in the bank.* [Italics ours.]
>
> 48. Excavation.—*All dredged or excavated materials, of whatever nature,* will be classified as "Excavations." All excavations shall conform to such lines, slopes, and grades as may be given by the engineer officer and anything taken out beyond such given limits will not be paid for by the United States. The price for excavation shall include the removal of the material to its place of deposit. [Italics ours.]

Would not reasonable persons be presumed to have taken into consideration the foregoing information when making their bid?

In addition to this, however, appellants had actual knowledge. Two of the members of the firm, Christie and Heyworth, after the bids were advertised, made a visit to the Government engineer's office at Tuscaloosa, Ala., and spent five days examining the drawings and records. They then went to the site of Lock and Dam No. 6 with the Government engineer, R. C. McCalla, who offered to take them (Rec., 47) to the sites of Locks 4 and 5, but they did not go,

and the findings show that (Rec., 53) at the time of the inspection "*they admitted they had reason to and did expect to encounter some logs, * * *.*"

The question naturally suggests itself whether if reasonable and intelligent men about to undertake the execution of a great contract had access to public reports of the chief of engineers in charge of the snag boats on this river for 20 years showing the river to be embedded with logs; if the public records and common knowledge about the high waters, floods, and alluvial characteristics of the river were known to them; if at the very places where the locks were to be constructed logs, stumps, and drift were projecting out of the water; if, after being warned by sections 47 and 48 of the specifications that they were to estimate with regard to logs, stumps, and roots under water, they made a personal examination of the river itself and of one of the locks and dams where logs were in plain sight, *would they have made any change in the amount of their bid had the boring sheets indicated that in only 6 borings out of 147 there was a "probable indication* that logs *may* have been encountered"? Having such actual notice, of what force and effect would it have been to represent on the drawings a "probable indication that logs may have been encountered"?

In the case of *Slaughter's Administrator* v. *Gerson* (13 Wall., 379, 383), quoted with approval

by Mr. Justice Brewer in *Farnsworth* v. *Duffner* (142 U. S., 47), the court said:

> A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of the purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made and acts upon the information thus obtained.

To the same effect is *Shappirio* v. *Goldberg* (192 U. S., 232).

In the case of *Clapham* v. *Shillito* (7 Bevan's Rep., 149) Lord Langdale stated the English rule that has been observed generally in this country as follows:

> If the means of investigation and verification be at hand, and the attention of the party receiving the representation be

> drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained and thus the notion of reliance on the representations made to him may be excluded.

In the case of *Farrar* v. *Churchill* (135 U. S., 615) the court said:

> If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he can not say that he relied on the vendor's representations. (*Southern Development Co.* v. *Silva*, 125 U. S., 245; *Bowe* v. *U. S.*, 42 Fed Rep., 761, 783.)

Appellants also claim damages for increased cost because of the " material in the ground being harder than was shown by the boring sheets." The findings say (Finding IV, Rec., 53):

> Claimants found the materials were more difficult and expensive to penetrate and excavate than ordinary sand, gravel, or clay, such as described or named in said drawings.

It is impossible to illustrate on a drawing, except by words, the state of hardness of clay, sand, or gravel. It will be admitted without question by counsel that the drawings in this case do indicate, as far as words can, whether the sand or clay was hard. Finding VI (Rec., 56) is as follows:

> In addition to a sandy soil underlaid by thick and heavy beds of gravel, the follow-

> ing material, which indicate in some places easy driving and in others hard driving, was shown on the drawings: Hard sand, very hard sand (white, red, and blue in color), sand and gravel, hard sand and gravel, very hard sand and gravel, sand and blue clay, closely packed sand and coarse gravel, sandstone, and rock.

The court below was unable to estimate damages. It said (Rec., 79):

> The findings do not show cemented sand and gravel or conglomerate sandstone. There was sand and gravel, otherwise known as conglomerate material, but defendants did not warrant the nature of the material to be excavated, but having warned intending bidders to investigate and satisfy themselves and it being established that *no agent of the Government had any knowledge as to the existence of conglomerate* in the foundation material under any of the structures, the court is unable to make an allowance on this item.

In the case of *Nesbit* v. *L. C. & C. Railroad Co.* (2 Speers, 697) a contractor brought suit to recover from a company alleged damages for the excavation of hardpan in the construction of an open roadway, where the contract provided that he was to be paid a stipulated price for every cubic yard of earth contained therein, and in case rock excavation should occur, then additional for such as might be determined by the engineer. The

contractor claimed extra pay for excavating the hardpan. Counsel for the contractor introduced expert testimony to show the custom among engineers and railroad contractors in a situation such as here presented, but the court said (p. 704):

> Is the plaintiff entitled to any compensation for digging up iron ore, lead ore, or marl, if there had been any on the route? Read the contract. The work he was obliged to do; but he has accepted as his compensation, so much per cubic yard, for all the earth which the section *may contain*. By that I understand, not that you are to look to the substances which may be dug up, but after the excavation is made you measure it, and thus ascertain the cubic yards it contains. It is idle to say, when the party has stipulated to take *that* as his compensation, because his excavation was more difficult than he expected, that therefore, he is to be paid for it. The defendant has the right to put his finger on the contract and say, *there* is what you were to do, *here* is what I am to pay.

Appellee maintains that appellants had presumptive and actual knowledge sufficient to make it wholly unnecessary for the Government to enter on the boring sheets the 6 borings out of a total of 147 where there were possible indications of having encountered logs; that in any event appellants did not rely on the findings or boring sheets, but made a personal inspection which

revealed the self-evident fact that logs were in the bed of the stream.

It is a strange commentary that no protests in writing were made regarding these alleged claims, nor was there any appeal taken to the superior officer, nor were any damages claimed until long after the completion of these locks and dams.

(*b*) *The findings contradict the statement in appellants' brief that a "number of buried logs were discovered in the course of the borings."*

The divergence between the findings and counsel's statement is so wide as to be worthy of comment. On page 7 of counsel's brief, it is said:

> A number of buried logs were discovered in the course of the borings, but these by direction of the resident engineer were omitted from the drawings * * * .

The findings (Rec., 52) say:

> *The foreman's record of said uncompleted borings contains no positive information that a sunken log was struck, and in only three of the borings at each of Locks 5 and 6 is there probable indication that logs may have been encountered.* [Italics ours.]

And again (Rec., 52):

> The drill when being driven down into the ground would sometimes meet obstructions which from the particles broken off and floating to the surface would indicate that *they might be logs.* [Italics ours.]

On page 53 of the findings the following language is used:

> The buried logs, found beneath the surface of the earth as aforesaid, were not described or named in the drawings.

This refers to the logs which it is alleged were struck when the piles were being driven, and not when the borings were being made. So we repeat without reservation that the findings do not show that a single log was actually struck during the borings. It is obvious, then, that the Government could not represent on the boring sheets that logs *were* encountered. Moreover, if the Government agents had been certain that logs were struck, it would not have changed the situation in the least for them to have depicted that fact on the drawings, for these contractors already knew of the existence of logs.

(*c*) *The manner and purpose of making the borings.*

As appellants were permitted to introduce testimony as to what was in the mind of the resident engineer at the time the borings were in progress in order to prove misrepresentations on the part of the Government engineer (Finding IV, Rec., p. 52), it becomes necessary to show how the borings were made and the purpose the Government had in making them.

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The borings were made for the purpose of ascertaining the availability and character of the foundation required. (Finding IV, Rec., p. 51.) Preparatory to making them the ground was staked out in plots 50 by 68 feet, in each of which spaces there was to be placed one boring. When an accident happened, such as the loss of a drill, a mishap to the apparatus, or other difficulty, the instrument was moved a short distance within the same area, where it was driven down to a point suitable for the construction of foundations, completing the boring.

To have placed on the drawings both the abandoned boring and the completed one would have been superfluous. The completed boring was sufficient to show bed rock or lack of bed rock within the space designated.

Hence it will be seen that there were good and sufficient reasons for not recording the 16 uncompleted borings on the drawings.

As to the process of making the borings the findings say:

> The borings were made with a water jet forced down through 1-inch pipe, joined together on the outside by a sleeve or coupling, and coming up between the 1-inch pipe and the outer casing of 2-inch pipe, and constantly bringing up samples of the materials penetrated. (Rec., 51.)

The space from the outside of the 1-inch pipe to the inside of the 2-inch pipe would have been

somewhat less than an inch. This was also reduced by the sleeves or couplings joining together the 1-inch pipe. The space was still more limited by the size of the drill. The material was first softened by the jet and then crushed into small particles by the drill, so that the drift floating up through such a narrow space, perhaps not over one-fourth of an inch, must necessarily have been so small as to leave a doubt, as indicated by the findings, in the mind of the foreman as to the nature of the material to be encountered. Again, on the six occasions when the indications were that logs may have been met, attention is directed to the fact that they were not necessarily permanently embedded in the stream, but might be dislodged and washed down the river at the succeeding high-water stage.

Of the 16 times when the record of the drilling was not shown on the drawings the findings indicate that on 10 of these at least no indications of logs were encountered and it is, therefore, fair to presume that on these 10 occasions the drill was lost or the boring apparatus, the description of which in the findings does not indicate great strength, was put out of commission. Surely it will not be argued that in such instances the drawings should have shown the uncompleted boring, especially when a completed boring in the same block of territory carried the information to indicate bedrock, or the basis upon which foundations could be constructed.

Attention is directed to a reference made to an alleged statement of the Government witness McCalla (Rec., p. 52) as follows:

> The existence *of any indication* of such buried logs at the time the borings were being made was called to the attention of the resident engineer by the engineer in local charge of the boring parties, and when asked if logs were to be noted in the record of borings, the resident engineer said that he did not consider the logs, *as the boring sheets then indicated,* of enough importance to be noted, and same were not noted. (Italics ours.)

Evidently the word " sheets " in the seventh line is an inadvertence, for at no time did the sheets show that logs had been struck. It is apparent that the word " record " should be substituted for " sheets." What Engineer McCalla actually did say it is impossible to determine. It will be noted from the opinion of Mr. Justice Howry (Rec., p. 82), that the resident engineer (McCalla), who is charged with intentional misrepresentation, was dead before his proof could ever be taken, although he was alive for sometime after the alleged claim accrued. The quoted statements of the engineer in local charge were objected to by the Government (Rec., p. 64; also opinion Rec., pp. 69, 70), but are admitted by the court under the following theory:

> By the law of the United States, act 3d March, 1887 (24 Stat. L., p. 505), all claim-

> ants in this court are made competent witnesses in their own behalf without qualification. The law of the United States is paramount, and parties in this court may testify though inhibited from so doing by State law. (Rec., p. 64.)

Reliance upon testimony of so doubtful a nature reveals the desperateness of appellants' claim. We can not see the importance of this statement, except in so far as it corroborates the Government's position that the evidence of logs struck was so questionable as not to have permitted the engineer, in good conscience, to represent that logs were met. It substantiates the Government's language in the specifications when it left out the 16 borings and stated that "the material to be excavated, *as far as known*, is shown by the drawings."

It is said in the findings (Rec., p. 52) that the boring sheets "contained only the record of completed borings and do not show any record of sunken logs, or of cemented sand and gravel, or conglomerate impenetrable by the drill." The purpose for which the borings were made would explain this, even though logs might have been encountered, for Findings IV (Rec., p. 51) states that they were made "for the primary purpose of ascertaining the availability of sites for said locks and dams and to determine what kind of a foundation whether rock or pile would be neces-

sary." In explanation of this statement the finding amplifies as follows:

> to ascertain whether the sites selected for the locks were underlaid with rock or other suitable strata upon which all structures could be directly built or whether it would be necessary to drive piles in order to secure suitable and stable foundations. (Rec., p. 51.)

(*d*) *The terms of the contract and the findings exclude the idea of a warranty. This case differentiated from Hollerbach* v. *The United States* (*233 U. S., 165*) *and other cases.*

The contract informed appellants that they might expect to meet with logs in the excavation. Section 47 of the specifications says: "Grubbing and clearing will cover the removal from the site of all trees, bushes, stumps, logs, roots, *as well as logs, stumps, and roots under water, or embedded in the bank.*" [Italics ours.] And section 48 says: "All dredged or excavated materials, of whatever nature, will be classified as 'Excavations.'" And again: "Bidders must inform and satisfy themselves as to the nature of the material."

In view of the foregoing and of the personal examination made by the principals, Christie and Heyworth, it must be conceded that sufficient notice was given, and with all the information and warnings before them, appellants acted independently of any representations of the Government.

Was there, then, (1) a warranty in the specifications and (2) did they rely upon a warranty?

There was no misrepresentation, either by statement or concealment, and the Government was literally correct when it incorporated into the specifications that "the material to be excavated, *as far as known*, is shown by the borings." All the rest was purely speculative. There being no positive knowledge or proof of logs or conglomerate under the water, the specifications and drawings did not warrant against them. The phrase, "as far as known," eliminated this. And the Government guarded itself in the very same sentence by ordering the bidders to "inform and satisfy themselves as to the nature of the material."

Appellants rely upon the case of *Hollerbach* v. *The United States* (233 U. S., 165, 171), where the action arose over a contract for the repair of Dam No. 1 on Green River, Kentucky. It was alleged that claimants suffered damages "which would not have accrued had the dam been backed with broken stone, sawdust, and sediment, as was stated in paragraph 33 of the specifications attached to the contract," being as follows:

> The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest.

It was found by the court below that said "dam was not backed with broken stone, sawdust, and sediment, as stated in paragraph 33 of the speci-

fications," but that said backing was composed of a soft, slushy sediment from a height of about 2 feet from the crest to an average depth of 7 feet, and below that to the bottom of the required excavation said dam was backed by cribwork of an average height of 4.3 feet, consisting of sound logs filled with stones.

The difference in the backing of the dam cost $6,549.23.

The distinction between the *Hollerbach* case and the one at bar is twofold:

First, in the *Hollerbach* case the statement of the material behind the dam was in no way qualified. In other words, it was a warranty, for it was a "positive and material representation." Whereas in the case at bar there was no warranty, for no positive representations were made, the language being limited to what the findings show the Government *actually* knew.

Second, in the *Hollerbach* case claimant relied upon the statements of the Government as to the backing behind the dam. In the case at bar appellants did not rely upon the representations of the specifications and the boring sheets.

Counsel also rely on the case of *Pearson & Son* v. *Dublin Corporation* (1907 Appeal Cases, 351), decided by the House of Lords. The facts were that S. Pearson & Son entered into a contract to construct certain sewage outfall works according to plans, drawings, and specifications furnished

by the Dublin Corporation. The terms of the contract stipulated that:

> The contractor should satisfy himself as to the dimensions, levels, and nature of all existing works and other things connected with the contract works; that the corporation did not hold itself responsible for the accuracy of the information as to the sections or foundations of existing walls and works; and that no charges for extra work or otherwise would be allowed in consequence of incorrect information or inaccuracies in the drawings or specifications. (Page 351.)

The contract was performed and appellants brought an action claiming "damages for false representations as to the position, dimensions, and foundations of the wall, whereby the appellants were compelled to execute more costly works than would otherwise have been required." The case was taken away from the jury by the trial court, and on appeal the House of Lords sent the case back for a new trial, disavowing in the several opinions of the members of the appellate court any intention to pass on the merits of the case. Evidence had been adduced at the trial by which it might have been concluded that the plaintiffs made statements that were false, either with knowledge or with reckless indifference as to their truth, and that upon these statements defendants had relied. One of the witnesses for the re-

spondents stated that he and his assistants had prepared the plans for the purpose of saving cost; that he knew when preparing the plans " that if a contractor had reason to believe that the wall was nonexisting his tender would be substantially increased, and that he would practically have estimated for a cofferdam costing £25,000." That " The existence of the wall to a depth of 9 feet was the backbone of the scheme." That the witness had every doubt as to the existence of the wall, and the exact depth, shape, character, and construction; that the plans were designed to show a foundation of 9 feet below ordnance datum, to be unknown and uncertain after that point. His examination concluded with the following questions and answers.

> 1723. Do I understand you seriously to admit that at the meeting of the three engineers it was deliberately arranged that these plans were to be put forward to indicate what you have told us on the information you have mentioned?
>
> Certainly.
>
> 1724. Am I right in saying your statement on November 10 is correct, that they were mainly influenced in that by the desire to have a cheap job?
>
> Certainly.
>
> 1725. Was the object of this to induce the contractor to moderate his estimate?
>
> Certainly.

1726. That is what it was intended for; the design was intended for that, and deliberately designed in that way?

Certainly; deliberately designed.

By agreement and arrangement?

Certainly.

(Page 357.)

The foregoing is, apparently, an attempt to prove fraud, upon which there was sufficient evidence in the minds of the Lords to let the case go to the jury. Such a case would not come within the jurisdiction of the Court of Claims, for the Government has never permitted itself to be sued upon a tort. There was a false representation knowingly made, which was relied upon by the other party who did not have opportunity and did not make an examination to test the representations, and who suffered damage thereby. In the case at bar there was no false representation nor representation implying bad faith. Furthermore, appellants did not rely upon the Government's representations. So much for the circumstances surrounding the cases. But the *Pearson* case is not applicable, because it turns solely on a point of law, namely, the right of the court to take away the case from the jury, and does not establish a precedent upon any of the questions involved in the case at bar.

Another case from which appellants derive great comfort is that of *Boyd & Forrest* v. *Glas-*

gow & South Western Railway Company (1 Scots Law Times Reports, 1914, p. 171). The action there arose out of a contract for the construction of a railroad *extending over many miles.* The contractors had only two weeks to make their estimate. Not having time for an examination of their own, they relied on the representations of the railway company. Among these representations was a "journal of bores," in which the description of what was found in the bores was supposed to be stated. The borings in this case were made to disclose the character of the material to be excavated, and hence the journal should have accurately reported what was found. It appears that the bores reports were made into a journal, but in the making the words of description of the borer were vitally changed, so as to give a totally different meaning. For example:

> The word "hard" in the report was struck out, the expressions giving name to substances—"black ban," "rock," "appears to be rock"—disappear, and a different name, "blaes," is put in, this name, we are told, being understood in engineers' and contractors' language to indicate a material which was not hard, but soft. The insertion of the word "blaes" was intended to convey to the contractor that the depth of material which the borer called "hard" and "rock" was a soft material (page 175).

The engineer altered the report of the men making the bores to suit his own views. Also certain check bores were made, but no journals of these were laid open to the contractor. The Lord Justice-Clerk (p. 176) says:

> A journal of bores must be assumed to be a statement of the borer, stating what in his judgment he found, not a statement of some one else of what they think he found. The journal should contain the borer's facts.

Lord Salvesen (p. 187) said:

> The matter becomes still more serious when regard is had to the reports of the borer in connection with the five so-called check bores. These bores were apparently sunk for the purpose of confirming the reports that had been given of the material encountered in two of the bores. So far from doing this the borers in each case reported that at the point where black blaes had been found in these bores rock was now encountered; yet this information was withheld from the contractors.

Here was a direct changing of a positively known fact. It is clear that if certain words were altered so as to falsify the facts, whether knowingly or otherwise, that this would be intentional misrepresentation. And on this data, or lack of data, the contractors acted to their damage. This case, however, differs from the case at bar, in that in the case at bar there were no false representa-

tions made, either knowingly or otherwise or relied on. It is of importance to note the difference in the physical facts of these two cases. In the case of *Boyd & Forrest* v. *Glasgow & South-Western Railway Company* the work extended over a stretch of many miles and the contractors had only two weeks' time in which to make an investigation. They were, therefore, compelled to rely on the statements of the railway company. In the case at bar, on December 20, 1899, the advertisement for bids was made. "On or about January 1, 1900," two of the members of the firm were in Tuscaloosa, Alabama (a town located on the very river where the contract was to be performed), getting information and examining plans and specifications. They made a trip to the site of Lock and Dam No. 6, and had made their plans and completed their trip fifteen days before the time for submitting their bid. The territory covered by the excavations to be made was inconsequential compared to that traversed by the railroad. The locks, which were but a few miles apart (Rec., p. 26), were to be 387½ feet long by 322 feet between quoins and 52 feet wide in chamber, so that the inspection of the territory upon which the construction was to be made would have taken but a very short time. In the one case the contractors were compelled to rely upon the railway's representations, because of territorial conditions; while in the other they had ample opportunity to and did inform themselves of the existing conditions.

Moreover, there was no information given by the borers in the case at bar that was altered by the engineers so as to mean something else.

In general principle the case at bar is similar to that of *Simpson* v. *The United States* (172 U. S., 372). This litigation arose over a contract to construct a dry dock at the Brooklyn Navy Yard, which, in the language of the contract, was to be "upon an available site to be provided by the Government." The advertisement referred the bidders for information relating to the location and site of the dock to the commandant of that navy yard. He had previously caused a set of borings to be made in accordance with the directions from the Navy Department, the results of which were illustrated on a profile plan purporting to show the character of the underlying soil. These were handed to plaintiffs upon their request for information as to the proposed site before they submitted their bids. The contractors asserted that they figured the amount of their bid upon the assumption that the underlying soil would prove to be as indicated on the boring sheet. While at work the contractors encountered shifting sand where the boring sheet showed firm soil. Thus the work was made more difficult and costly. The contractors sued for extra services and materials, alleging that the site selected was not "available owing to the unfavorable and unstable character of the soil." It was held that as the

contract contained no warranty, express or implied, concerning the character of the underlying soil the contractors could not recover. Concerning the boring sheets it was said (p. 381):

> The fact that the bidders knew that a test of the soil in the yard had been made, and drew the contract providing that the dock should be located on a site to be designated by the United States without any express stipulation that there was a warranty in their favor that the ground selected should be of a defined character, precludes the conception that the terms of the contract imposed such obligation on the Government in the absence of a full and clear expression to that effect, or at least an unavoidable implication.

Similarly in the case at bar the words " as far as known " qualify the language regarding the material to be excavated, as shown by the boring sheets in such a way as to preclude a warranty. In fact, they are a disclaimer of a warranty, and coupled with the following line warning the bidders to inform and satisfy themselves, exonerates the Government from such an obligation.

The case of the *Sanitary District of Chicago* v. *Ricker et al.* (91 Fed. Rep., 833), decided by the Circuit Court of Appeals for the Seventh Circuit, bears a remarkable similarity to the one at bar. There the charge was made of false representations by the trustees of the Sanitary District as to

the character of material to be excavated. Bids were advertised for six sections of a drainage canal, it being stated, among other things, that the specifications and plans could be seen at the office of the chief engineer at Chicago. Ricker, through his engineer, Weston, obtained copies of the specifications from the officer of the Sanitary District showing a profile of the ground, grades, and topography of the country where the work was to be constructed. Weston communicated this information to his employer. Two weeks later Weston and Ricker visited the chief engineer of the Sanitary District, examined the plans and profiles, and questioned him with regard to their reliability. He replied that they were approximately correct and could be relied on. Weston and Ricker examined to some extent the entire line of the canal, a large part of Section F being under water, so that the surveys could not be examined. They found in a spoil bank designated by the chief engineer sand, clay, and gravel and occasional bowlders. Later they talked with him regarding the profile and its reliability, and finally filed their proposal, which was subsequently accepted and a contract entered into including the following section:

> (13) Classification of material: All material excavated under the provisions of this contract is to be classified under one or the other of two heads, viz, "glacial drift"

> and " solid rock." Glacial drift shall comprise the top soil, earth, muck, sand, gravel, clay, hardpan, bowlders, fragmentary rock displaced from its original bed, and any other material that overlies bed rock. Solid rock shall comprise all rock found in its original bed, even though it may be so loosened from the adjacent underlying rock that it can be removed without blasting.

It appeared that during the investigation of section F the defendant had in its possession a series of 11 bores made two years before, partly upon and partly adjacent to the main drainage canal on section F, the results of which were tabulated and filed in the defendant's office. Several of these borings showed material to be excavated of a very different character from that disclosed by the borings of the profiles exhibited to the complainant. The Circuit Court entered a decree setting aside and rescinding the contract upon the ground that without presuming that the defendant's engineer, or any member of the board of trustees, knew of the existence of the hard substances, or even suspected them to exist there, it was nevertheless in the power of the engineer to have ascertained such fact with a reasonable degree of certainty; that any one, had his attention been called thereto, could, if he so desired, ascertain the result of the borings on file in defendant's office and been advised that they differed considerably from that found on the profile exhibited

to bidders. It does not appear, however, that the contractors had any actual knowledge of the existence of the intractable material. The Circuit Court of Appeals reversed the lower court and said (Woods, circuit judge, delivering the opinion):

> 1. The trustees of the Sanitary District of Chicago, as representatives of a municipal corporation required by law to let contracts for public work to the lowest bidder after advertisement, are not bound to exercise diligence to obtain information concerning the nature or cost of the work for the benefit of the bidders, with whom they deal at arms length, their sole duty in that regard being to the corporation; and a contractor for the excavation of a section of the drainage canal is not entitled to a rescission of his contract because he encountered a substance more difficult and expensive to excavate than anything he was led to expect from an examination of the profile and data in the office of the chief engineer—no intentional fraud being charged against the trustees or engineer—nor because some of the trustees knew, or should have known, of the existence of further information on the subject of which they did not inform the contractor.
>
> 2. The chief engineer of the Sanitary District of Chicago is not authorized by virtue of his office to bind the trustees, whose duty it is under the law to let contracts for work on the drainage canal, nor

the district, by representations made to an intending bidder as to the nature of the materials to be excavated in a given section of the work; much less by expressions of opinion thereon.

3. The Sanitary District of Chicago is represented by its board of trustees as a body, and can not be held responsible because certain individual trustees had knowledge of information regarding the materials likely to be encountered in the excavation of a section of the canal which was not contained in the profile exhibited for the information of bidders, and did not communicate such knowledge to an intending bidder.

In the trial of the case at bar experts were put on the stand by appellants to prove the purpose of borings such as were made by the Government, and the court incorporated in Finding IV (Rec., 53) the following:

> Borings such as these are generally made by the owner of the works to be constructed and show truly and fully the existence of all material met, including objects embedded in the soil, such as logs or stumps, and the definite location of the boring actually made.

This paragraph does not conflict with that part of paragraph 48 of the specifications which says: "The material to be excavated, as far as known, is shown by the borings," etc.; for, in the few in-

stances in which objects were met, it was not known what they were from the evidence of the floating particles coming up with the water in the very narrow limits between the 2-inch casing and the 1-inch pipe. The men having the boring in charge could only "show *truly* and fully the existence * * * of logs and stumps," etc., when they actually knew they were logs and stumps and not, perhaps, a fence rail, dressed lumber, or limb of a tree that might have given up small splinters, but which could not have been any impediment to a pile-driven log.

It is conceded that where the terms of a contract are ambiguous the rule laid down in the paragraph of Finding IV hereinbefore quoted is pertinent, but it is not relevant to the facts in this case, for the reason that the language of paragraph 48 of the finding is so clear as to need no illumination of expert testimony.

In the case of *Nesbit* v. *L. C. & C. Railroad Co.* (*supra,* 697) along this line the court said:

> But it is said this contract is to be construed according to the usage among engineers and railroad contractors. I have admitted that words and terms of ambiguous meaning might be construed by usage; but I deny that there is any principle in the law which will, by usage, add independent stipulations to a contract. The effect of the usuage contended for *here* is exactly that; it is, in substance, to add

> to this contract a provision by which the defendant is to be bound to pay to the plaintiff 18¾ cents additional, for every cubic yard of the hardpan excavation.

DISSENTING OPINION.

The dissenting opinion of Mr. Justice Barney appears to be based on the theory that paragraph 48 of the specifications contained a warranty that the boring sheets represented the materials to be excavated, whereas they did not truly represent the materials encountered by the Government when making the borings; that "plaintiffs had a right to rely upon them, and did rely upon them, to their damage."

The dissenting opinion asserts that "sunken logs were encountered."

By way of contrast with this statement we again set forth the following from Finding IV (Rec., 52):

> The foreman's record of said uncompleted borings contains *no positive information that a sunken log was struck,* and in only three of the borings at each of Locks 5 and 6 is there probable indication that logs may have been encountered. [Italics ours.]

As to whether plaintiffs had a right to rely upon the Government's representations, and "did rely upon them to their damage," the Government is contented to rest upon what has been heretofore shown regarding these phases of the case.

II.

"ERRONEOUS ANGLES OF REPOSE."

The engineer officer of the Government, being empowered, selected angles of repose in general use, thus excluding charge of bad faith. In the absence of protest by appellants and having been paid the contract price for all excavation removed, damages can not be collected.

(1) The engineer officer being authorized to select the angle of repose, in the absence of a finding charging bad faith his selection can not be disputed.

The angle of repose is the angle at which the material beneath the slope will stand in place under normal conditions for sufficient time to complete the work.

The engineer officer designated a 1 on 1 slope. Appellants claim that this slope permitted the earth to slough down into the lock pits below, and the expense of removing this sloughed earth was $1 per cubic yard over and above the contract price. They were paid the contract price for every cubic yard of earth removed to meet the angle of repose designated by the engineer. They now claim $45,000 additional because of the alleged extra cost of moving 45,000 cubic yards of this earth, which had sloughed off the banks and fallen down in the lock pits below, *although they had already been paid the contract price for the 45,000 yards.* The

validity of their claim is determined by the answer to the question as to whether the engineer officer's selection of the angle of repose was final in the absence of a charge of negligence, in selecting the same, so gross as to be equivalent to a charge of bad faith.

The specifications say (par. 48, p. 27):

> Excavation: All dredged or excavated materials, of whatever nature, will be classified as "Excavation." All excavations shall conform to such lines, slopes, and grades *as may be given by the engineer officer and anything taken out beyond such given limits will not be paid for by the United States.* The price for excavation shall include the moval of the material to its place of deposit.
>
> * * * * *
>
> The limits of the excavation and quantities to be excavated will depend upon the ascertained angles of repose. [Italics ours.]

There is no finding of bad faith on the part of the engineer officers who had this work in charge. Mr. Justice Howry, in his opinion (p. 78) discussing the claim for damages because of the angle of repose, says:

> Can plaintiffs now claim anything unless there be fraud or errors so gross as to imply bad faith? We think not, and as neither fraud, actual or constructive, *nor error so gross as to imply bad faith is charged or proven* against either Col. Rossell or Col. Spencer Cosby who, at different times had charge of the work and the right to decide differences relating to the meaning of the

contract subject to appeal, there is no right to recover on this item.

And here it should be stated, in view of the charge of incompetence and unreasonableness, that there is nothing in the conduct of either one of the chief engineer officers or of the resident engineer or other agent of the Government to reflect upon their capacity, reasonableness, or good faith from the beginning to the end. [Italics ours.]

If, then, the engineer officer was empowered by the contract to select the angle of repose and in making this selection he has not been found chargeable with negligence so gross as to imply bad faith, it is maintained that this claim for damages is foreclosed.

In the case of *Gleason* v. *United States* (175 U. S., 602) the court said:

> Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts. (*Martinsburg & Potomac Railroad* v. *March*, 114 U. S., 549; *Chicago, Santa Fe, &c., Railroad* v. *Price*, 138 U. S., 185.)
>
> *Kihlberg* v. *United States*, 97 U. S., 398. *United States* v. *Barlow*, 184 U. S., 123.

(2) No angle of repose would have remained stable during the abnormal season of 1900–1901.

It is said (Finding V, Rec., p. 55):

> The angle of 1 on 1 prescribed by the engineer officer was an angle at which the banks would stand for the time necessary to complete the work when not submerged from rises in the river or when in a dry condition.
>
> *There was no angle or slope which could have been adopted by which the banks would remain stable when subjected* to such rises of the river as were liable to happen in times of flood.
>
> To have sloped the banks to a flatter angle would have reduced the sloughing, but the evidence does not show to what extent. (Italics ours.)

And Finding V, Rec., p. 55:

> The slopes of the excavation were not flattened by the engineer officers because, in their opinion, there was no practical angle at which the banks could have been sloped which would have caused them to remain stable under the abnormal conditions to which they were subjected, or have prevented the banks from sloughing and caving as the floods and rises in the river receded.

If the angle of repose had been 1 on 3, or greater, instead of 1 on 1, it would have meant an additional amount of earth to be removed from the slopes. Appellants would have had to expend a great deal more time and the Government more money. Ap-

pellants would undoubtedly have objected to this, as time was of great importance owing to the shortness of the working seasons. Moreover, the amount of earth that would have sloughed from a more gentle slope is wholly theoretical, as there was no way of determining what it would have been. Therefore, in selecting the 1 on 1 slope the engineer officers were using a discretion which was commendable.

(3) *The angle of repose selected being the customary one under ordinary conditions and not having been objected to, appellants are foreclosed from asking damages.*

The angle of repose selected was the one in general use on the Mississippi River for the slopes of temporary excavation. (Finding V, Rec., 54.) It was used previously by the engineer officer in other work on the Warrior River. The excavation here was, of course, only temporary. It was expected that all of the work of excavation would be completed, the foundations put in, and the land walls of the lock structures erected to a safe elevation before the arrival of winter floods. Hence the stability of the banks in abnormal times would not be material. (Finding V, Rec., 54.)

The engineer officer estimated that the angle of repose selected was of such a grade that the materials on the banks would keep in place " under normal conditions for sufficient time to allow the work to be done for which the excavation was made." Undoubtedly, in a normal season his esti-

mate would have been true, but the records show that this was an unusual, abnormal season.

The hydrographs of the Tuskaloosa gauge from the years 1893 to 1899, inclusive, kept by the Government, as compared with the gauge records for 1900–1901, show an average of less than 17 days a year that the water rose above the 8-foot stage (the limit of protection expected to be afforded by the permanent sheet piling); *whereas during the 1900–1901 season the average was, approximately, 57 days.* Finding V (Rec., 54) says:

> The conditions actually encountered during the working seasons of 1900 and 1901 were abnormal. During each of said seasons the work under the contract was hindered by a series of floods, freshets, and unlooked-for rises of the Warrior River, more numerous and of greater height and longer duration than theretofore disclosed by the official records of the engineer's office relating to said river.

The angle of repose having been selected to meet conditions that were normal, the engineer officer could not be held responsible in view of the unexpected conditions of weather which occurred during those seasons. Moreover, appellants made no protests (Rec., 55) to the engineer officer who was chargeable. It is true that they made verbal protests and complaints to the local engineer in regard to the adoption of flatter slopes, but they failed to make any written protest while the work was going

on against the angle that had been prescribed by the engineer officer. They took no appeal from the decision of the engineer officer respecting the angle selected (Finding V, Rec., 55). Under such conditions they can not now be heard to complain, for with no protest or notice for additional compensation for extra work, the engineer officer did not have an opportunity to determine whether or not he would insist on the work proceeding as he had indicated, or refer the matter to his superior.

Bowe v. *United States,* 42 Fed. Rep., 778; *Ripley* v. *United States,* 223 U. S., 695; *Plumley* v. *United States,* 226 U. S., 545.)

There was on file in the Government office at Tuscaloosa a set of cross-section sheets showing the different angles of all the slopes substantially at 1 on 1 behind structures for temporary work, and a flatter slope of 1 on 1½ to 1 on 2 for all permanent work at the time the examination was made by appellants for the purpose of preparing their bid (Finding V, Rec., 54). They could have examined these sheets, as they were open to them. In fact, one of the prospective bidders did examine them, but claimants made no attempt to estimate the approximate quantities of excavation prior to submiting their bid, nor did they make any inquiry as to the manner in which the approximate amounts were determined.

Counsel for appellants (App. brief, p. 45) complain that the engineer officer refused to permit

them to use sheathing (spec. 51) for the protection of the slopes. This is fully answered in the opinion of the court (Rec., p. 55).

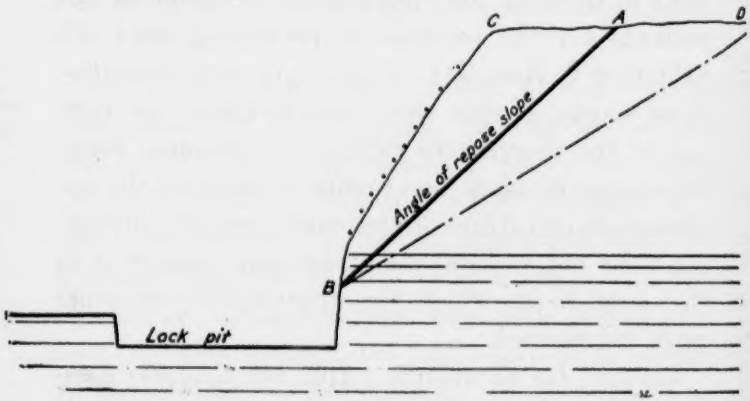
(4) *Appellants have been paid the contract price for all excavation removed.*

When paragraph 48 of the specifications is read in connection with that part of paragraph 76 which is as follows:

> Excavation will be measured in excavation by the cubic yard as determined by cross sections—

it will be apparent that appellants were only to be paid for the material within lines designated by the engineer.

They were to be paid for excavation at No. 4, 28 cents; at No. 5, 32 cents; and at No. 6, 31 cents per cubic yard. The following figure is used for illustration:



The engineer fixed the line of slope as shown by the line A–B. Appellants were then to be paid the contract price for each cubic yard of material excavated from within the triangular prism A–B–C, as determined by cross sections made from time to time. When the excavation of the entire prism A–B–C was completed, the contractors were, of course, entitled to be paid the full contract price for excavation, less the usual retained percentage. According to the finding (pp. 55–6) appellants were paid the contract rate for such excavation.

If before the contractors had completed the excavation back to the slope line A–B, the material within the prism referred to sloughed off into the lock pit, they would be entitled to no more than the contract price for such excavation, even though it was more expensive to remove it from the lock pit. That was one of the usual and ordinary risks incident to the performance of the contract. If it cost the contractors more to excavate the sloughed-off material from the lock pit than it would have cost if they had taken it from the original slope back *to* the angle of repose before the sloughing took place, that can not be charged to the Government. They certainly can not attribute the fact of the " sloughing " to any act, fault, or neglect of the United States.

The substance of the appellants' contention so far as it relates to the material sloughing off from within the prism A–B–C is that they ought to be

paid $1.28 per cubic yard for its excavation, instead of the contract price of 28 cents per cubic yard.

If it is the contention of appellants' counsel that appellants should now be paid for the cost or "extra" cost of excavating material outside of the line A–B and back to the actual angle of repose assumed to be the line B–D; that is to say for the excavation of the material lying within the triangular prism A–B–D, they are precluded from such recovery by the very terms of the contract which provides (par. 48):

> Anything taken out beyond such given limits will *not* be paid for by the United States.

It might have been necessary in order to complete this work to remove material from back of the assumed line of slope, A–B, but nevertheless it must be done without cost to the United States.

The terms of the contract as to measurements and payment for excavation do not differ materially from the terms of the contract in the case of *Bowers Hydraulic Dredging Company* v. *The United States* (211 U. S., 176).

There the material removed was to be paid for "by the cubic yard measured in place." So it was here (Rec. pp. 35, 38, and 42). There the contract provided "that work done outside the designated lines of excavation * * * will not be paid for." Here it is provided that "anything taken out beyond such given limits will not be paid for by the

United States " (paragraph 47, p. 27). There the lines of excavation were "designated" by stakes and ranges set by the United States engineer. Here it is provided that " all excavations shall conform to such lines, slope, and grades as may be given by the engineer officer " (par. 47, p. 27).

Mr. Justice White, speaking for the court in the Bowers Dredging Company case, after summing up the provisions of the contract with respect to the measurement of and payment for excavation, which correspond with the provisions of the contract in the case at bar, said:

> we think the conclusion is beyond reasonable controversy that the contract, by its express terms and without ambiguity, excludes the possibility of holding that earth which might slide from the slopes during the excavation was to be paid for by the United States. (Supra, 187.)

(*5*) *The claim for damages for excavating material which buried certain timber frames falls with the claim for damages because of an alleged incorrect angle of repose.*

Appellants claim damages for the excavation of 879 cubic yards of material from Locks 5 and 6. It appears that this material covered certain timber frames erected and used by them as concrete forms. The Government makes no argument on this item for the reason that it is foreclosed by finding V, page 56 of the record, which says: " Said excava-

tion was done voluntarily by claimants for the purpose of recovering the forms to be re-used by them," and the court refuses to allow them anything. It does not appear that the Government was responsible for the material being at that place. In fact, it is not shown where the material came from. If it was silt carried down the river, or débris, then the Government would not be liable, as appellants do not claim (Finding V, Rec., 55, 56) that the Government is chargeable with the cost of the removal of silt or débris carried down the stream into the lock pits or excavation.

III.

"CONSTRUCTION OF COFFERDAMS."

The Government was not responsible for the cost of cofferdams since it was provided that the contractors should build them at their own expense.

Under their third assignment of error (brief, p. 3) appellants claim damages for the cost of cofferdams built by them on the order of the United States engineer officer in charge, and for which said officer agreed to pay, etc. The gravamen of their claim is that the contractors were allowed discretionary power by the contract in determining whether cofferdams should be built; that the discretion was taken away by an order from the engineer officer to build the cofferdams (appellants' brief, p. 49) upon a promise to pay them at a certain rate and appellants having constructed the cofferdams, the Gov-

ernment should pay the actual cost of completing the same, which they allege was $11,456.91. Finding 8 (Rec., 60), referring to this feature of the suit, says, "if claimants are entitled to recover therefor on quantum meruit or otherwise, there would be due $8,520.24."

Paragraphs 45 and 46 of the specifications provide:

> 45. Cofferdams.—*All pumping, bailing, and temporary works needed to protect the permanent work from water, during construction, shall be done by the contractor at his own expense,* the cost of same to be included in his prices for concrete, timber, etc. It is probable that the sheet piling entering into permanent construction can, with proper banking and shoring, be made to serve the purpose of cofferdams, but the contractor must rely upon his own judgment in regard to this. Should additional cofferdams be needed they shall be built on plans approved by the engineer officer, and, where liable to interfere directly or indirectly with navigation, shall be removed when no longer needed, the building, maintaining, and removal of same to be without cost to the United States.
>
> 46. Dams.—It is probable that the dams can be built without cofferdamming, but the contractor must rely upon his own judgment in regard to this, and should cofferdams prove necessary, it is understood and agreed that they shall be furnished by the contractor without cost to the United States.

> The method of construction suggested is first to dredge the site of dam to a level about 6 inches below the pile heads, then drive the three rows of sheet piling continuously from one end cutting them off a sufficient distance below low water to permit the low-water flow of the river to pass over them without much head, then drive the foundation piles and cut them off at grade, then build the cribwork one course at a time filled and sheathed, protecting the work, where necessary, by temporary flashboards from the water, which will continuously flow over the work in a thin sheet. The dam shall be filled with gravel or stone or both at the option of the engineer officer.

Paragraph 45 provides that the cost of all temporary works should be at the contractor's expense, and that should additional cofferdams be needed they should be built on plans approved by the engineer officer. *The cofferdams were temporary works and were necessary for the protection of the permanent work, in the opinion of the engineer officer.*

Paragraph 46 left it to the contractor's judgment as to whether the dams should be built without cofferdamming. This did not conflict with that part of paragraph 45 which provided in addition to this for the possibility of temporary works to protect the permanent works from water during construction, and with section 78 which gave the United States engineer officer in charge the final decision as to whether protection was needed.

In order that that work might continue at the end of the first season the engineer officer decided that it was necessary to finish the cofferdams so as to permit the permanent work to be continued during the winter. In this way the contractors were being given more time to carry out their contract, and they were informed that the foregoing was the reason for the officer's ordering the cofferdams to be built. Unless he made his decision in a manner so grossly negligent as to imply bad faith, then appellants can not be heard to complain.

The findings declare (Rec., 83) that the resident engineer was not chargeable with fraud, actual or constructive, nor was there any negligence or mistake in his conduct such as would imply bad faith.

The engineer officer mistakenly agreed to pay appellants the contract price for sheet piles and $3 per thousand feet board measure for such part of these cofferdams as they might be required to remove when no longer needed. This was accepted by appellants and they immediately ordered the materials. Before they could construct the cofferdams the Warrior River rose and they could not work during the winter season.

Subsequently the engineer officer notified the claimants that he questioned his authority to pay for the cofferdams. Claimants protested and the matter was referred to the Chief of Engineers and from him to the Secretary of War. The latter submitted the question to the Judge Advocate General

of the Army, who decided (finding 8, Rec., 59) "that the Secretary of War had no legal authority to modify the contract so as to provide that the contractors should be paid for this work, which view was approved by the Secretary of War and the claimants were notified accordingly." Claimants afterwards constructed the cofferdams.

Appellants contend that paragraph 88 of the specifications gave the engineer officer full power to pay the cost of cofferdams. The part of paragraph 88 which is pertinent is as follows:

> If at any time it should become necessary, in the opinion of the engineer officer in charge *to do any work or make any purchases not herein specified,* for the proper completion of this contract, the contractor will be required to furnish the same at the current rates existing at the time of said purchases or work. The current rates to be determined by the engineer officer in charge.

This paragraph does not apply to cofferdams, for they were expressly specified in paragraphs 45 and 46, and they were to be furnished by the contractor, without cost, should their construction prove necessary. When the engineer officer determined that they were necessary for the protection of the work the terms of the contract were fully met. (Rec., 85.)

This court in the case of *Plumley* v. *United States* (226 U. S., 545) has declared that the contractor could not recover for costs of work which,

being extras, had not been ordered by the engineer officer in the manner required by the contract.

In the case at bar appellants made claim for damages on the ground of fraudulent representation on the part of certain Government engineers in concealing reports of river gauges. The opinion of the Court of Claims dwelt on this phase at length. But as appellants do not urge fraud in their brief in this court, we take it that they have abandoned this ground and we shall not discuss it further.

Respectfully submitted.

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